



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-142

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Mayerson and Associates, attorneys for petitioners, Gary S. Mayerson, Esq., and Brianne N. Dotts, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which did not grant their request to be reimbursed for their daughter's tuition costs at the McCarton School (McCarton), and for other costs incurred, for the 2009-10 school year. Respondent (the district) cross-appeals from the impartial hearing officer's determination that the individualized education program (IEP) offered to the student for the 2009-10 school year was a "nullity". Both parties appeal from the impartial hearing officer's determination limiting the scope of the impartial hearing, and seek an order remanding the matter back to the impartial hearing officer for a new impartial hearing. The appeal must be sustained in part. The cross-appeal must be sustained in part.

At the time that the impartial hearing convened in October 2009, the student was attending McCarton. McCarton is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education programs and related services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

As relevant to the instant appeal, the Committee on Special Education (CSE) met on May 12, 2009 for an annual review to develop an IEP for the student for the 2009-10 school year (Dist.

Ex. 1 at p. 1). Participants included a school psychologist who also acted as the district representative, a special education teacher, a psychologist from McCarton, the director of McCarton, an applied behavioral analysis (ABA) therapist, a speech-language pathologist, an additional parent member, and the student's mother (id. at p. 2).¹ As a result of the review, the CSE continued the student's eligibility for special education programs and services as a student with autism and recommended a 6:1+1 class in a special school with related services for a 12-month school year (id. at p. 1).

In a due process complaint notice dated June 29, 2009, the parents, through their attorney, alleged that the district failed to offer the student a FAPE in a timely manner for the 2009-10 school year (Parent Ex. B at p. 1). The parents specifically asserted that the district did not provide an IEP for the student and that the district failed to offer the student an appropriate placement or program (id. at p. 2). The parents further asserted that the district's final notice of recommendation (FNR) dated June 11, 2009, was inappropriate because the recommended school was not able to offer 1:1 teaching instruction throughout the day and the school did not have ABA services (id.). In addition, the parents asserted that the district failed to develop or propose a transition plan for the student (id.). The parents also alleged in the June 29, 2009 due process complaint notice that the "placement, program and interventions" provided by the parents for the student were appropriate and that the equities favored the parents (id.). As a remedy, the parents proposed that they be awarded reimbursement for tuition and costs at McCarton and supplemental ABA services (15 hours per week) for the 2009-10 12-month school year (id. at p. 3). In their due process complaint notice, the parents also "invoke[d] [the student's] pendency entitlements,"² based upon a prior unappealed impartial hearing officer decision dated May 13, 2009 regarding the 2008-09 school year (id. at p. 2).

On July 14, 2009, the parents submitted a "Proposed Amended" due process complaint notice regarding the student's May 2009 IEP (Parent Ex. A at p. 1). The parents asserted that the May 2009 IEP was untimely and raised additional assertions in support of their claim that the IEP was defective including, among other things, that: (1) the district did not develop certain assessment reports or properly consider private evaluations and assessments of the student; (2) the district did not properly assess and document the student's "present levels" and progress; (3) the district did not provide a copy of the IEP to the parents at the conclusion of the May 2009 CSE meeting and "unilaterally perform[ed]" "IEP development functions" without the student's mother; (4) the district did not offer or recommend a specific placement location at the CSE meeting; (5) the recommended placement was not appropriate as it did not meet the student's need for 1:1 teaching instruction and ABA services; (6) the related services offered in the IEP were insufficient; (7) a regular education teacher was not present at the CSE meeting; (8) a school social worker was not present at the CSE meeting; (9) the district did not develop or recommend a transition plan; and (10) the district did not conduct a functional behavioral assessment (FBA), rendering the behavioral intervention plan (BIP) defective (id. at pp. 3-5). As a remedy, the parents proposed

¹ The psychologist from the private school, director of the private school, ABA therapist and speech-language pathologist participated by telephone.

² For relevant statutory provisions pertaining to a student's "pendency" or "stay-put" placement during due process proceedings see 20 U.S.C. § 1415(j) and New York Education Law § 4404(4). See 34 C.F.R. § 300.518 and 8 NYCRR 200.5(m) for relevant federal and State regulations.

that they be awarded reimbursement for tuition and costs at McCarton and supplemental ABA services (15 hours per week) for the 2009-10 12-month school year (*id.* at p. 6).

An impartial hearing was conducted on October 15, 2009 and concluded after the impartial hearing officer terminated the hearing during the testimony of the first witness (Tr. pp. 1, 29-47, 50-51; IHO Decision at p. 5; Pet ¶¶ 7, 14; Answer ¶¶ 33-34).

In a decision dated November 3, 2009, the impartial hearing officer determined that the FNR was a "nullity because it was issued without an IEP on which to base it" and that the "IEP itself was a nullity at the time it was required to be issued" (before the start of the 12-month school year) (IHO Decision at p. 3). The impartial hearing officer ordered that the matter be remanded back to a CSE for further consideration (*id.*). The impartial hearing officer further concluded that "[t]here was no placement made and so there is no [p]rong [one] case to be made pursuant to the familiar ... Burlington test" (*id.* at p. 5).³ Although the impartial hearing officer noted that both parties "have urged me to hear the 'merits' of this case even if I conclude, as I have, that the procedural foundation is defective," he found that it was not necessary to consider the first, second or third prongs of the "Burlington" test, "or even to undertake the Burlington test at all" (*id.*).⁴

The impartial hearing officer also ordered that "until such time as that placement recommendation is agreed upon by the parents and district," or the matter is "finally adjudicated if disputed by the parents," the student's placement for the 2009-10 school year remains as "the placement identified by the district and the parents as the last mutually-agreed-upon placement for pendency purposes" (IHO Decision at p. 3).

On appeal, the parents state that they do not dispute the impartial hearing officer's finding that the district "failed (procedurally) to offer [the student] a FAPE for the 2009-10 school year" (Pet ¶ 28),⁵ but additionally assert that they "contest the [impartial hearing officer's] failure and refusal to go forward to hear and adjudicate the other Prong I issues, and then hear and adjudicate evidence on Prongs II and III" (Pet. ¶ 8). The parents further assert that after both parties presented opening statements, the district presented one witness, the parents were not given the opportunity to cross-examine the witness, and the impartial hearing officer refused to hear the rest of the case. The parents assert that they were entitled to a full impartial hearing as to all issues and that the impartial hearing officer's failure to properly adjudicate all of the claims and defenses on the merits constitutes a deprivation of their due process right to an impartial hearing. As relief, the parents request that the matter be remanded to the impartial hearing officer to decide the merits of the case

³ See *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359 (1985) and *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). These two cases combined stand for the proposition that a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if: 1) the services offered by the board of education were inadequate or inappropriate, 2) the services selected by the parents were appropriate, and 3) equitable considerations support the parents' claim (*Carter*, 510 U.S. at 15-16; *Burlington*, 471 U.S. at 369-70).

⁴ See footnote 3, *supra*.

⁵ The impartial hearing officer did not make a specific finding that a FAPE was not offered to the student; however a review of the impartial hearing officer's decision suggests that his conclusion was not inconsistent with such a finding.

in accordance with "the Burlington/Carter three pronged [sic] analysis." Pending final adjudication, the parents also request that a State Review Officer direct the district to comply with its pendency obligations. The parents also attach additional evidence to their petition for consideration by a State Review Officer.

In its answer and cross-appeal, the district asserts that the impartial hearing officer erred in finding a "deprivation of FAPE" (Answer ¶ 41) for the 2009-10 school year. The district also asserts that the impartial hearing officer's finding was premature as the parties were not allowed to complete the presentation of testimony and evidence, and the finding was contrary to the limited evidence that the impartial hearing officer allowed to be presented. The district further argues that it was precluded by the impartial hearing officer from presenting evidence at the hearing showing that any harm caused by the alleged procedural violation did not rise to the level of denying the student a FAPE. In addition, the district concurs with the argument by the parents that the impartial hearing officer erred in not affording the parties an opportunity to adequately develop the record and asserts that the impartial hearing officer's refusal to conduct an impartial hearing on the merits was improper as a matter of law. The district joins the parents in their request that the matter be remanded to the impartial hearing officer for further development of the record. The district further requests that a State Review Officer direct the impartial hearing officer to complete the impartial hearing and render a decision no later than March 15, 2010.

Regarding pendency, the district concurs with the parents that the student's pendency placement is the school attended by the student for the 2008-09 school year and further represents, contrary to the assertion in the parents' petition (Pet. at p. 1), that the district has authorized pendency payments upon submission by the parents of proof of the student's attendance (Answer at p. 12, n. 1). The parents filed no answer or reply controverting the district's assertion in its answer and cross-appeal that it has authorized "pendency payments" upon submission by the parents of proof of the student's attendance. Therefore, it appears that there is agreement between the parties as to the student's current educational placement and the district's corresponding obligations. Under these circumstances, I need not modify the impartial hearing officer's pendency determination; therefore, upon remand, unless the parties otherwise agree or other exceptions to the pendency requirements apply, the student's pendency placement will remain his current educational placement as identified by the parties and ordered by the impartial hearing officer.

In an answer to the district's cross-appeal, the parents maintain that the impartial hearing officer properly determined that the district denied the student a FAPE. The parents, however, join the district's request to annul that part of the impartial hearing officer's decision that did not permit the parties to develop a complete hearing record and join the district's request to remand the matter to the impartial hearing officer. The parents' further assert that their additional evidence should be accepted on appeal.

Initially, I note that the parents attached exhibits to their petition for consideration as additional evidence. The district objects to the acceptance of the additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see Application of the Bd. of Educ., Appeal No. 09-060; Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a

Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, I decline to consider the additional documentary evidence submitted by the parents because it is not necessary in order to render a decision in this appeal.

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably

calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7; Burlington, 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

Upon review of the hearing record and the arguments presented on appeal, including the arguments presented by both parties seeking the same or similar relief from the decision below, I find that the impartial hearing officer erred in reaching his decision and both appeals must be sustained in part.

First, in this matter, brought by a July 2009 amended due process complaint notice, the parents seek an award of reimbursement for tuition and other costs. It is well settled, both in case law and statute, that the traditional Burlington/Carter analysis should be applied when reaching the merits of a due process complaint notice filed by a parent seeking tuition reimbursement for a unilateral parental private placement. (see Burlington, 471 U.S. at 370; Carter, 510 U.S. at 15-16; see also Gagliardo, 489 F.3d at 111-12; Frank G. v. Bd. of Educ., 459 F.3d 356, 363-64 [2d Cir. 2006]); Cerra, 427 F.3d at 192; M.S. v. Bd. of Educ., 231 F.3d 96, 102 [2d Cir. 2000]); M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; 20 U.S.C. 1412 § [a][10][C][ii]; see also Application of a Child with a Disability, Appeal No. 03-003). Here, the impartial hearing officer reached the

merits of the case, but declined to apply a Burlington/Carter analysis, thus he erred in not applying the correct legal standard.

Second, the hearing record shows that the impartial hearing officer reached a conclusion that the district's IEP was a nullity based upon an alleged procedural defect without adequately assessing facts to determine, as required by caselaw and statute, whether the procedural defect (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H., 2008 WL 3930028, at *7; Matrejek, 471 F. Supp. 2d at 419). The impartial hearing officer committed reversible error because he did not apply the correct legal standard when assessing the alleged procedural violation.

Third, under the facts of this case, where the impartial hearing officer reached a decision on the merits, the parties were not afforded adequate due process at the impartial hearing because they were not allowed to present evidence and confront, cross-examine, and compel the attendance of witnesses to present their respective cases. I note that both parties concur on appeal that the impartial hearing officer erred by failing to allow the parties to fully develop the hearing record. The district was not allowed an opportunity to present evidence to support their argument that the alleged procedural violations involving the IEP did not rise to the level that would support a determination that a FAPE was denied. In addition, as correctly pointed out by the parents on appeal, the parents were not allowed by the impartial hearing officer to present the rest of their arguments, including supplementing their argument that the IEP document was delivered in an untimely manner and that the recommended IEP did not offer the student a FAPE. Moreover, neither party was allowed to present evidence regarding the appropriateness of the parents' unilateral private placement or on the issue of equities.

Where a party to an impartial hearing appeals the decision of an impartial hearing officer, the official conducting the review must "[e]nsure that the procedures at the hearing were consistent with the requirements of due process" (34 CFR 300.514[b][2][ii]; see 8 NYCRR 200.1[x][4][iv], [v]). With respect to the manner in which the impartial hearing was conducted, I will consider further whether the failure of the impartial hearing officer to allow the parties to fully develop the hearing record constituted a violation of due process.

The IDEA requires that certain procedures be in place to safeguard the right of students with disabilities to a FAPE (see 20 U.S.C. § 1415). A parent or school district may initiate a hearing to present complaints regarding the identification, evaluation, or educational placement of a student with a disability (or a student suspected of having a disability) or the provision of a FAPE to such student (34 C.F.R. § 300.507(a); 8 NYCRR 200.5[i][1]). Impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 C.F.R. § 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]). State regulations provide that an impartial hearing officer "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][d]) and contain provisions stating that "[e]ach party shall have up to one day to present its case unless the impartial hearing officer determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][iii][xiii]).

The hearing record supports the contention by the parties that the impartial hearing officer improperly precluded the presentation of evidence by both the parents and the district at the impartial hearing, and the hearing record further supports a conclusion that such preclusion constitutes a due process violation warranting annulment of the impartial hearing officer's decision (see Application of a Student with a Disability, Appeal No. 08-094; see also Application of a Child with a Disability, Appeal No. 04-018; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of the Bd. of Educ., Appeal No. 97-92). In the case before me, I note that the impartial hearing officer indicated in his decision that both parties "urged" him to hear the "'merits'" of the case (IHO Decision at p. 5). The hearing record further reflects that when the parents' attorney expressed at the impartial hearing that he was "uncomfortable not developing a full record" and expressed that he had a "duty to develop" a full record, the impartial hearing officer responded by expressing that "under the law, you have one day to do that. I'm not willing to extend that period of time simply so that you can build a record" (Tr. p. 50).

After a review of the hearing record, I find that there is no evidence that the parties were attempting to introduce irrelevant, immaterial or unduly repetitious testimony, or that the parties were attempting to impermissibly delay the hearing. By improperly limiting the parents' ability to cross-examine the district's witness, the impartial hearing officer improperly precluded the parents' presentation of evidence at the impartial hearing such that the parents were not afforded due process. Moreover, this improper preclusion extended to both parties when the impartial hearing officer ended the hearing prematurely without allowing the parties to present the evidence relevant to their claims and defenses (Tr. pp. 50-51).

Having found that the procedures at the impartial hearing were not consistent with the requirements of due process (34 C.F.R. § 300.514[b][2][ii]) and that the impartial hearing officer erred in not applying the correct legal standards, I will vacate the impartial hearing officer's decision in its entirety and remand this matter for further proceedings consistent with this decision. While the impartial hearing officer's decision is vacated by this decision, I have made no determination as to the merits of either parties' claims or arguments pertaining to whether the student was offered a FAPE or whether reimbursement for tuition and other costs is appropriate. I note also that upon remand, unless the parties otherwise agree, no resolution session is required and the parties may proceed to a direct continuation of the impartial hearing.

As to the student's pendency placement it remains the same as identified by both the parties during the proceeding below (Tr. pp. 11-12) and by the impartial hearing officer's decision, until changed by agreement between the parties or by operation of law (34 C.F.R. § 300.518; 8 NYCRR 200.5[m]).

I have examined the parties' remaining contentions and find it is unnecessary to address them in light of my decision herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated November 3, 2009 is hereby annulled; and

IT IS FURTHER ORDERED that, unless the parties otherwise agree, the impartial hearing shall reconvene within 30 days from the date of this decision, before the impartial hearing officer who issued the decision that is the subject of this appeal, and the impartial hearing shall be completed in a manner consistent with federal and State regulations; and

IT IS FURTHER ORDERED that, if the impartial hearing officer who issued the decision that is the subject of this appeal is not available to conduct the new impartial hearing, a new impartial hearing officer shall be appointed.

Dated: **Albany, New York**
 February 26, 2010

PAUL F. KELLY
STATE REVIEW OFFICER